In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-344

ANTON N. J. HEYN,
Petitioner

versus

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE; HOMER L. HITT; GEORGE C. BRANAM; WILLIAM B. GOOD; and MANUEL L. IBANEZ,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petition of Anton N. J. Heyn respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on March 31, 1977, a rehearing of which was denied by the United States Court of Appeals for the Fifth Circuit on June 6, 1977.

OPINIONS BELOW

The judgment and per curiam opinion of the United States Court of Appeals for the Fifth Circuit, which is not reported, appears as Appendix "E" hereto.

The opinions of the United States District Court for the Eastern District of Louisiana, reported at 417 F.Supp. 603 (E.D. La. 1976), appear respectively as Appendix "B" and "D" hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was dated and entered on March 31, 1977. A Petition for Rehearing En Banc or, Alternatively, for Rehearing by Assigned Panel was filed in the United States Court of Appeals for the Fifth Circuit on April 14, 1977. The Petition for Rehearing was denied on May 9, 1977. On May 23, 1977 the United States Court of Appeals for the Fifth Circuit vacated its May 9, 1977 order denying the Petition for Rehearing. On June 6, 1977 the United States Court of Appeals for the Fifth Circuit denied the Petition for Rehearing.

28 U.S.C. § 1254(1) confers jurisdiction on this Court to review the judgment in question by writ of certiorari.

QUESTIONS FOR REVIEW

This suit was filed pursuant to 42 U.S.C. §1983 as a result of discriminatory employment practices carried out against the plaintiff, a college professor, by the defendant university and certain of its administrators as reprisals for the plaintiff's exercise of his constitutional freedom of speech and to stifle his further exercise of that freedom. The discriminatory practices spanned a period of several years and continued even into the plaintiff's mandatory retirement at the age of 70 in May, 1976. Plaintiff attempted unsuccessfully to obtain non-judicial relief from the discriminatory practices through university channels and otherwise before resorting to the filing of this suit on July 30, 1973. The discrimination continued even after the filing of this suit.

In 1966 and 1967, certain of the defendant administrators made serious written charges against the plaintiff, which were false, including accusations of incompetence, neglect of duty, and forgery, and based upon those charges recommended to plaintiff's superiors that he be discharged for cause. Those false written charges were placed in plaintiff's personnel file maintained by the university and were never made known or disclosed to plaintiff. Plaintiff first learned of the existence of those false charges during discovery in this suit. Those false charges were known to university officials and were relied upon by them in denying plaintiff relief from the discriminatory practices against him.

The district court dismissed the suit upon the ground that all actions against the plaintiff prior to July 31, 1972 were barred by the Louisiana one-year statute of limitations applicable to tort actions and granted summary judgment upon the ground that there were no *allegations* of actions taken against plaintiff after July 31, 1972. The district court denied as moot plaintiff's motion for leave to file an amended complaint with respect to the false written accusations against him which were concealed by defendants until unearthed during discovery in this action. The court of appeals affirmed without oral argument on its summary calendar in a one word per curiam.

The questions presented for review are:

1. What statute of limitations is applicable to this case of unconstitutional discriminatory employment practices.

2. Whether the Louisiana one-year statute of limitations can constitutionally be applied to this case under the supremacy clause.

3. If the one-year statute is applicable does it begin to run before the discriminatory practices cease or before the employment relationship terminates.

4. If the one-year statute is applicable, was it tolled by plaintiff's efforts to obtain non-judicial relief and is *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716 (1975), to apply prospectively only or retroactively also.

5. Whether plaintiff alleged any discriminatory practices after July 31, 1972.

6. Whether plaintiff's amended complaint, which alleged that the false written accusations concealed from him were reprisals for the exercise of his First Amendment freedom of speech and denied him due process and equal protection of the law, was moot.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Article VI, Clause 2 provides:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ;

> and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The United States Constitution, Amendment I, provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The United States Constitution, Amendment XIV, Section 1 provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Louisiana Civil Code Article 3536 provides in pertinent part:

> "The following actions are also prescribed by one year:
>
> That for injurious words, whether verbal or written, and that for damages caused by animals, or resulting from offenses or quasi offenses."

Louisiana Civil Code Article 3544 provides:

> "In general, all personal actions, except those before enumerated, are prescribed by ten years."

STATEMENT OF CASE

Plaintiff is an eminent biophysicist with an international reputation among scientists as one of the foremost authorities in the world in his areas of specialization, cytology and molecular biology. His research is funded by the National Science Foundation (NSF) and others. Linus Pauling, the only man who has been awarded two Nobel prizes, has acclaimed that plaintiff "is the world's leading authority" in the study of the molecular structure of cellulose. Plaintiff's works are widely published and cited.

Plaintiff commenced employment as a full professor of biology and as Chairman of the Department of Biology at the University of New Orleans (UNO), which is a state university, in September 1963. His work has highly praised by his superiors at UNO and he received an $1,800 raise for the 1964 school year. In 1964 plaintiff's superior wrote that it would be a "gross waste of talent" and a "misuse of

ability" for plaintiff to teach freshman biology.

Shortly thereafter in late 1964 and early 1965, plaintiff began to express his opposition to what he considered to be ruthless personnel practices in the firing of qualified but not tenured young teachers at UNO. In protest of those personnel practices, plaintiff voluntarily resigned as Chairman of the Biology Department effective June 1, 1965.

During the same period of time there was strong sentiment by the UNO administration to separate UNO from the Louisiana State University system. Plaintiff openly expressed his opposition to that movement.

On June 9, 1965, plaintiff wrote a memorandum through channels to the Vice-Chancellor of UNO, defendant Branam, criticizing the ruthless firing practices which he opposed. He was severely criticized the next day by Branam for having so expressed his opinion and Branam has testified in depositions that it was "unwise" and "ill-advised" for plaintiff to express his opinions. Immediately thereafter the retributions began. Plaintiff received no raise for the 1965 school year. In fact, his salary was effectively frozen for 5 years as he received only two raises totalling $550 between 1965 and 1970. Plaintiff made many attempts within the university system to have his salary adjusted but was unsuccessful. He finally obtained a small measure of relief with regard to his salary through the American Association of University Professors (AAUP), which forced UNO to give Mr. Heyn a raise for the 1970 school year. It was recognized, however, that plaintiff's salary "has remained at a level unusually low for a man of his rank and service" and since the retributions began, plaintiff's salary has always remained far below (as much as $4,600 per year)

the average salary of other UNO professors.

The retributions taken by UNO against plaintiff for the free exercise of his speech took other forms as well, and, in fact, permeated every aspect of his employment by UNO up to and even after his retirement in 1976. The reprisals included, for example, teaching assignments, sabbatical leave, travel expenses and many unfounded and abusive accusations against plaintiff. With regard to teaching assignments, plaintiff was assigned to teach *exclusively* freshmen courses and has been required to teach 50% more freshmen courses at UNO than any other professor. More than half of the professors at UNO have never taught any freshmen courses. Similarly, plaintiff has been required to teach more freshmen lab courses than any other professor at UNO while more than 80% of the professors have not taught any such courses. In addition, the services of a graduate assistant were not made available to the plaintiff for his freshmen lab courses as was customarily done with other faculty members required to teach those courses. Plaintiff was assigned a much greater teaching load than the other professors at UNO and was not afforded the customary reduction given to other faculty members who, like plaintiff, were engaged in funded research programs. UNO refused to allow plaintiff to continue to teach the courses in his areas of specialization, which he had always previously taught. Plaintiff was assigned to teach more Saturday morning classes than any other professor at UNO.

Plaintiff was invited to teach during his sabbatical leave at the University of Bern in Switzerland as a visiting professor which was a great honor. Although plaintiff was entitled to the sabbatical leave under UNO regulations, it was refused

to him by UNO without any reason. Plaintiff, unlike other professors, was not allowed travel expenses for presenting papers at out-of-state symposia and seminars.

Plaintiff was also repeatedly harrassed by numerous abusive accusations which were completely unfounded. For example, the then 30 year old defendant Ibanez, who became Chairman of the Biology Department when Dr. Heyn resigned that position, repeatedly accused plaintiff in written memoranda, without even consulting him beforehand, of "erratic action", an "arrogant attitude", "irresponsibility and negligence in [his] every-day affairs", "irresponsible behavior", "flagrant violation of university regulations", and other similar characterizations. Plaintiff was compelled and did establish the falsity of each and every such accusation but, of course, he received no apology.

In October 1966, plaintiff appealed to the AAUP for relief with regard to being required to teach exclusively freshmen courses. The AAUP forced UNO to make adjustments in that regard, but other UNO reprisals against plaintiff quickly followed his appeal to the AAUP. In November 1966, defendant Ibanez and defendant Good (Dean of the College of Sciences) collaborated to fabricate the most serious charges against Dr. Heyn. A written memorandum was prepared charging Dr. Heyn with incompetence, neglect of duty, conduct seriously prejudicial to the university, forgery and making false statements to the Selective Service System. That memorandum, dated November 16, 1966, recommended plaintiff's discharge for cause. Defendant Branam, recognizing the memorandum for what it was, refused to act upon it, but it was nevertheless placed in plaintiff's personnel file. A similar memorandum and recommendation were written one year later and were also placed

in plaintiff's personnel file, but again were not acted on. Those charges, which were absolutely false, were never made known to the plaintiff and were concealed from him by defendants. Those charges, however, were known to the university officials and were relied upon to deny plaintiff's various appeals for relief against the discriminatory and abusive practices carried out against him. Plaintiff first learned of the existence of those charges when the memoranda were found in his file during discovery in this action.

Prior to filing this suit, plaintiff made many non-mandatory and non-judicial attempts to obtain relief even though UNO had no established procedures for doing so. For example, in August 1966 he sought relief without avail from the Chancellor of UNO with regard to his teaching assignments; in October 1966 he obtained temporary relief with regard to teaching assignments from the AAUP; in December 1968 and October 1969 plaintiff sought relief without avail from the Chancellor of UNO with regard to his salary; in January 1970 plaintiff obtained some relief from the AAUP with regard to his salary; in June 1970 plaintiff sought relief without avail from the LSU Board of Supervisors with regard to his salary; in February 1971 plaintiff sought relief without avail from the Governor of Louisiana with regard to his various grievances; in July 1972 plaintiff expressed his grievances to the Louisiana Attorney General's Office which conducted an investigation and which advised plaintiff in March 1973 that they were without power to act and recommended that plaintiff seek private counsel. Plaintiff did so and this lawsuit was filed in July 1973. Jurisdiction of the district court was founded on 28 U.S.C. §1343.

After discovery was largely completed a pre-trial conference was held on October 28, 1975, and a lengthy pre-trial order submitted by the parties. Plaintiff listed 77 witnesses in the pre-trial order and submitted several hundred uncontested exhibits to be introduced at the trial. The trial was scheduled to commence on Monday, December 15, 1975.

On November 12, 1975, defendants filed a motion for dismissal and, alternatively, for summary judgment. On the same date plaintiff filed a motion for leave to file an amended complaint as the pre-trial order stated he would do. The amended complaint did not raise any new factual issues, but merely sought to incorporate into the complaint matters brought out in discovery, particularly with respect to the two previously concealed memoranda discussed above and these matters were already included as issues in the pre-trial order. The motions were argued in the district court on November 18, 1975, but the district court did not rule on the motions and the parties prepared for trial. On the Friday afternoon before the trial was to begin, and when plaintiff was fully prepared for trial with witnesses subpoenaed, documents and charts prepared, proposed findings of fact and conclusions of law and a trial brief filed, etc., the district court advised the parties that the trial was continued. On March 12, 1976, the district court issued an order granting defendants' motions to dismiss and for summary judgment, discussed above, and dismissed plaintiff's motion to amend as moot (attached as Appendix "A"). The district court did not issue its reasons until June 7, 1976. Plaintiff's post-hearing motion for a reconsideration was denied on July 26, 1976 (Appendix "D"). Plaintiff appealed to the Fifth Circuit which placed the case on its summary calendar, refused oral argument, issued a one-word decision "Affirmed," and refused rehearing.

REASONS FOR THE ALLOWANCE OF THE WRIT

1. *Statute of Limitations*

Congress did not provide a statute of limitations for actions under 42 U.S.C. § 1983. In *O'Sullivan v. Felix*, 233 U.S. 318, 34 S.Ct. 596 (1914), this Court established that state limitation periods are to be applied in § 1983 actions. The lower courts have grappled with the problem of the applicable state statute of limitations with inconsistent and unsatisfactory results. The status of the law has been described and criticized by the law review commentators. Note, *Choice of Law Under Section 1983*, 37 U. CHI. L. REV. 494, 503-504 (1970); Note, *A Limitation on Actions for Deprivation of Federal Rights*, 68 COLUM. L. REV. 763 (1968).

There are conflicts between the circuits and even between different panels within the same circuit as illustrated in this case. For example, in *Warren v. Norman Realty Co.*, 513 F.2d 730 (8th Cir. 1975), the Eighth Circuit stated:

> "The federal courts have not reached uniform results in determining which state statute of limitations should be applied to various civil actions under the federal civil rights statutes.
>
> * * * * * *
>
> "Conclusions as to which state cause of action is analogous to a particular type of federal civil rights action have varied, as evidenced by this court's treatment of § 1983 actions. In some instances the court on the facts of the particular

> case has characterized the federal civil rights action as similar to a state tort or contract action, and the appropriate state tort or contract limitations period has been applied to the federal civil rights suit. *See, e.g.*, Johnson v. Dailey, 479 F.2d 86 (8th Cir.), cert. denied, 414 U.S. 1009, 94 S.Ct. 371, 88 L.Ed. 2d 246 (1973); Savage v. United States, 450 F.2d 449 (8th Cir. 1971), cert. denied, 405 U.S. 1043, 92 S.Ct. 1327, 31 L.Ed. 2d 585 (1972). The court in another case, however, declined to apply the state limitations period applicable to a tort or contract action, stressing that a federal civil rights action involves more than a tort or breach of contract, and applied alternatively the state statute of limitations for statutorily created liabilities or the limitation for actions not otherwise covered by a statute of limitations. See Glasscoe v. Howell, *supra*. *See also* Smith v. Cremins, 308 F.2d 187 (9th Cir. 1962); Lazard v. Boeing Co., 322 F. Supp. 343 (E.D. La. 1971)."
>
> *Id.* at pp. 733-734.

The approach of the Third Circuit is to apply the state statute of limitations applicable to the state tort action which is most analogous to the § 1983 claim. *Hughes v. Smith*, 389 F.2d 42 (3d Cir. 1968); *Funk v. Cable*, 251 F. Supp. 598 (M.D. Pa. 1966); *Conard v. Stitzel*, 225 F.Supp. 244 (E.D. Pa. 1963). Indeed, this approach has been adopted by some panels in the Fifth Circuit. *Kissinger v. Foti*, 544 F.2d 1257 (5th Cir. 1977); *Bryan v. Jones*, 519 F.2d 44 (5th Cir. 1975). The same approach has also been adopted by some decisions of the Sixth and Seventh Cir-

cuits as well. The Eighth Circuit has stated in *Reed v. Hutto*, 486 F.2d 534 (8th Cir. 1973):

> "Third Circuit decisions and some decisions in the Fifth, Sixth, and Seventh Circuits have applied the statute of limitations of the underlying tort as in *Savage*. THIRD CIRCUIT: Howell v. Cataldi, 464 F.2d 272 (1972); Thomas v. Howard, 455 F.2d 228 (1972); Orlando v. Baltimore & Ohio Ry., 455 F.2d 972 (1972); Hileman v. Knable, 391 F.2d 596 (1968); Hughes v. Smith, 389 F.2d 42 (1968); Henig v. Odorioso, 385 F. 2d 491 (1967), cert. denied, 390 U.S. 1016, 88 S.Ct. 1269, 20 L.Ed. 2d 166 (1968). FIFTH CIRCUIT: Shank v. Spruill, 406 F.2d 756 (1969); Beard v. Stephens, 372 F.2d 685 (1967). SIXTH CIRCUIT: Madison v. Wood, 410 F.2d 564 (1969); Mulligan v. Schlachter, 389 F.2d 231 (1968); Mohler v. Miller, 235 F.2d 153 (1956). SEVENTH CIRCUIT: Jones v. Jones, 410 F.2d 365 (1969), cert. denied, 396 U.S. 1013, 90 S.Ct. 547, 24 L.Ed. 2d 505 (1970)."
>
> *Id.* at p. 537, n. 2.

This approach, however, has been criticized by other circuit court decisions which recognize, as Justice Harlen did in his concurring opinion in *Monroe v. Pape*, 365 U.S. 167, 196, 81 S.Ct. 473, 486 (1961), that a claim for the denial of constitutional rights is significantly different from and more serious than a common law tort action. *Crawford v. Zeitler*, 326 F.2d 119 (6th Cir. 1964); *Smith v. Cremins*, 308 F.2d 187 (9th Cir. 1962).

Many states, unlike Louisiana, have statutes of limitations specifically applicable to liabilities created by statute. The Second, Fourth, Eighth, and Ninth Circuits and some cases in the Fifth and Sixth Circuits have applied those statutes of limitations to §1983 claims. *Kaiser v. Cahn*, 510 F.2d 282 (2d Cir. 1974); *Ortiz v. LaVallee*, 442 F.2d 912 (2d Cir. 1971); *Swan v. Board of Higher Education of City of New York*, 319 F.2d 56 (2d Cir. 1963); *Cox v. Stanton*, 529 F.2d 47 (4th Cir. 1975); *White v. Padgett*, 475 F.2d 79 (5th Cir. 1973); *Nevels v. Wilson*, 423 F.2d 691 (5th Cir. 1970); *Mason v. Owens-Illinois, Inc.*, 517 F.2d 520 (6th Cir. 1975); *Garner v. Stephens*, 460 F.2d 1144 (6th Cir. 1972); *Reed v. Hutto, supra; Glasscoe v. Howell*, 431 F.2d 863 (8th Cir. 1970); *Mills v. Small*, 446 F.2d 249 (9th Cir. 1971); *Smith v. Cremins, supra.* In states, such as Louisiana, which do not have a specific statute of limitations applicable to actions for liabilities created by statute, the District of Columbia Circuit, and some cases in the Fifth and Seventh Circuits apply the state's general or "catch-all" statute of limitations. *Macklin v. Spector Freight Systems,Inc.*, 478 F.2d 979, 994 (D.C. Cir. 1973); *Boshell v. Alabama Mental Health Board*, 473 F.2d 1369 (5th Cir. 1973); *Franklin v. City of Marks*, 439 F.2d 665 (5th Cir. 1971); *Duncan v. Nelson*, 466 F.2d 939 (7th Cir. 1972); *Waters v. Wisconsin Steel Wks. of Int'l. Harvester Co.*, 427 F.2d 476 (7th Cir. 1970); *Wakat v. Harlib*, 253 F. 2d 59 (7th Cir. 1958).

Conflict in the decisions of the courts of appeals abounds, even within decisions of the same circuit. No measure of uniformity can be achieved on this very important issue without guidance and direction from this Court.

No doubt part of the problem arises from the fact that the states have diverse statutes of limitations. Louisiana,

unlike many states, has not adopted a statute of limitations specifically applicable to civil rights suits or to actions for liabilities created by statute. Defendants here contend that the Louisiana one-year statute applicable to tort actions (La. C.C. Art. 3536) is applicable whereas plaintiff contends that the applicable period of limitations is ten years, as provided in Louisiana's general or "catch-all" statute (La. C.C. Art. 3544). There are no Louisiana state court decisions on point. The only Louisiana federal court decisions on point are *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 n. 16 (5th Cir. 1971), and *Lazard v. Boeing Co.*, 322 F.Supp. 343 (E.D. La. 1971). In both *Boudreaux* and *Lazard*, claims were presented for discriminatory employment practices for *racial* reasons pursuant to 42 U.S.C. § 1981. In both *Boudreaux* and *Lazard*, the courts held that the applicable period of limitations is the 10-year period provided in Louisiana Civil Code Article 3544. The difference between claims under §1981 and those under §1983 is that § 1981 claims apply only to racial discrimination, *e.g.*, *Agnew v. City of Compton*, 239 F.2d 226 (9th Cir. 1956), cert. denied, 353 U.S. 959, 76 S.Ct. 868. For statute of limitation purposes there is no difference between § 1981 and § 1983 claims, *Mason v. Owens-Illinois, Inc., supra; Baker v. F & F Investment*, 420 F.2d 1191 (7th Cir. 1970), and the decision in this case is therefore contrary to the decisions in *Boudreaux, supra*, and *Lazard, supra*. The result in this case is to create a different period of limitations depending upon whether the victim deprived of civil rights is white or black. No court has ever said that, but if that is to be the law, as it is in this case, the Court should be required to state it.

The decisions in *Boudreaux, supra*, and *Lazard, supra*, are

consistent with the District of Columbia Circuit's approach of applying the general statute of limitations to cases of discriminatory employment practices, *Macklin v. Spector Freight Systems, Inc., supra*, and to the Fifth Circuit's approach to every other discriminatory employment practices case (except this one) which has come before it. *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976) (rejecting the Alabama statutes of limitations applicable to torts and applying Alabama's general statute of limitations, Code of Alabama Title 7, Section 26); *United States v. Georgia Power Co.*, 474 F.2d 906, 924 (5th Cir. 1973) (stating at p. 924 "civil rights statutes have generally been held governed by the limitations on liabilities created by statutes."). Since the Fifth Circuit did not deem it appropriate to issue an opinion in this case, it is impossible to determine on what basis the Fifth Circuit decided to deviate from the rule in the Fifth Circuit in this case. Further, if the Fifth Circuit has decided to change the rule as to the applicable statute of limitations, which it did in this case, the rule should be applied prospectively only under *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349 (1971), which would preclude its application to this case.

Other reasons mandate the application of the ten-year statute to this case. Plaintiff's claims are founded in part, as recognized by the district court, on defendants' violation of plaintiff's contractual tenure rights. In Louisiana, actions for contractual violations are governed by the 10-year period provided in Civil Code Article 3544. *Louisiana Sportservice v. Monsour*, 59 So.2d 499 (La. App. 1952); *Gore v. Veith*, 156 So. 823 (La. App. 1934). Further, the Louisiana law is settled that its statutes of limitations are to be strictly construed and, if there are two possibly applicable statutes, the one which will permit the action will be

adopted over the one which would bar the action. *Foster v. Breaux*, 263 La. 1112, 270 So.2d 526 (1972); *United Carbon Co. v. Mississippi River Fuel Corp.*, 230 La. 709, 89 So.2d 209 (1956).

Plaintiff also contends that the one-year statute cannot constitutionally be applied in this case. In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716 (1975), this Court noted at footnote 7 that the limited grant of certiorari in that case precluded this Court from considering whether a one-year statute of limitations in Tennessee could be constitutionally applied to a civil rights action. That issue is here presented to the Court. The Virginia federal courts have repeatedly held that the one-year Virginia statute of limitations cannot constitutionally be applied to § 1983 cases, as it would be violative of the supremacy clause (Article VI of the United States Constitution.) *Van Horn v. Lukhard*, 392 F.Supp. 384 (E.D. Va. 1975); *Brown v. Blake & Bane, Inc.*, 409 F.Supp. 1246 (E.D. Va. 1976); *Edgerton v. Puckett*, 391 F.Supp. 463 (W.D. Va. 1975). The imposition of a one-year statute of limitation unduly burdens the vindication of constitutionally protected rights and defeats the congressional purpose in enacting the statute.

Even if the one-year statute is applicable, this suit is still not barred by it because under decisions of the District of Columbia Circuit and the Fifth Circuit, as well as other district courts, the statute of limitations does not begin to run in cases involving discriminatory employment practices of a continuous nature until the employment relationship ceases or until the discriminatory practices have ended. *Macklin v. Spector Freight Systems, Inc., supra; United States v.*

Georgia Power Company, supra; Dudley v. Textron, Inc. Burkart-Randall Division, 386 F.Supp. 602 (E.D. Pa. 1975); *Jamison v. Olga Coal Co.*, 335 F.Supp. 454 (S.D.W.Va. 1971); *Mixson v. Southern Bell Telephone and Telegraph Co.*, 334 F.Supp. 525 (N.D. Ga. 1971). As will be pointed out below, the discriminatory practices in this case continued up to the time of plaintiff's retirement in May 1976 and even thereafter. The decision in this case, therefore, represents an extreme departure from existing jurisprudence.

At issue here also is whether this Court's decision in *Johnson v. Railway Express Agency, Inc., supra*, which held that non-judicial efforts to obtain relief from discriminatory employment practices did not toll the statute of limitations in a § 1981 suit, is to be applied retroactively or prospectively only. Prior to the *Johnson* decision, the Fifth Circuit, as other courts, recognized the doctrine of tolling in civil rights suits. *Franks v. Bowman Transportation Co.*, 495 F.2d 398 (5th Cir. 1974), reversed and remanded on other grounds 424 U.S. 747, 96 S.Ct. 1251 (1976); *Johnson v. Goodyear Tire & Rubber Co., Synthetic Rub. Pl.*, 491 F. 2d 1364 (5th Cir. 1974); *Boudreaux v. Baton Rouge Marine Contracting Co., supra; Taliaferro v. Dykstra*, 388 F.Supp. 957 (E.D. Va. 1975). Some lower courts have held that *Johnson* will not be applied retroactively but rather will be applied prospectively only. *Pittman v. Anaconda Wire & Cable Co.*, 408 F.Supp. 286 (E.D.N.C. 1976), and cases cited therein; *Freeman v. Motor Convoy, Inc.*, 409 F.Supp. 1100, 1114 (N.D. Ga. 1976). Under the principles established by this Court in *Chevron Oil Co., v. Huson, supra, Johnson* should not be applied retroactively to this case and yet it apparently was by the courts below.

If the one-year statute is applicable and if *Johnson* is not to be applied retroactively, the issue presented, an important one, is whether plaintiff's non-mandatory non-judicial efforts to obtain relief from the discriminatory employment practices tolled the statute of limitations. The plaintiff here filed suit only after first exhausting all other possible avenues of relief within the system. His restraint from suing should be commended by fasioning an appropriate doctrine of tolling and not penalized when so many people in our society rush to the courthouse upon the slightest provocation. Not only is the rule of the district court in this case, which was apparently approved of by the Court of Appeals, unworkable, but it is also burdensome to the courts and to society. The rule is unworkable because in many instances of discriminatory employment practices the victim cannot even be certain he has been victimized unless and until the discriminatory practices persist over a period of time. Further, the rule is burdensome in that it would require persons who suspect they have been victimized to file suit immediately within one year whenever their suspicions are aroused. This would culminate in litigation over many matters which can and should be adjusted amicably between the parties and should never be in court. Dr. Heyn attempted to do this, going all the way up to the Attorney General and Governor of the State of Louisiana to obtain relief without litigation. The penalty imposed upon him by the courts below for his efforts should not be tolerated. The purpose of the statute of limitations, repose of stale claims, if the one-year statute is to be applied in this case, will in no way be disturbed because the defendants were well aware of plaintiff's claims and grievances through his repeated protests to them and others about the very abusive treatment he was receiving as a result of his courage in voicing his opinions of the university's personnel practices.

2. *Summary Judgment*

It is absolutely impossible to justify the summary judgment granted by the district court and affirmed by the court of appeals. It was granted by the trial court because "there exists no allegation of wrongdoing on the part of defendants on or after July 31, 1972, and that all of the alleged violations of plaintiff's civil rights occurred well before July 31, 1972." The district court simply ignored all of the discriminatory employment practices which occurred after July 31, 1972:

(a) Defendants continued to pay plaintiff a salary substantially less than the average salary paid to other full professors;

(b) Plaintiff was assigned to teach five freshmen courses in the fall of 1972, four in the fall of 1973, and one in the fall of 1974;

(c) Plaintiff was assigned to teach three freshmen lab courses in the fall of 1973, and did not receive the customary assistance of graduate assistants provided to other professors;

(d) Plaintiff was not allowed to teach his course of specialization, cytology, in 1972, 1973, 1974, 1975, or 1976;

(e) Plaintiff continued to be discriminated against even through 1975 in that he was not reimbursed for his travel expenses for giving lectures or presenting papers as other faculty members were:

(f) Defendants kept the existence of the malicious, false and defamatory documents about plaintiff in his personnel file without his knowledge or opportunity to be heard and they are still maintained in his file today;

(g) Plaintiff never even discovered the existence of those false and defamatory documents until 1975;

(h) Other abusive accusations made by defendants against plaintiff and proven by plaintiff to be false are still maintained in his personnel files;

(i) Plaintiff's retirement benefits are lower today than they should be because of the prior retributions with regard to his salary;

(j) Defendants have discriminatorily refused to allow plaintiff during his retirement to use university facilities to continue his research even though all other emeritus professors who desire are allowed to do so.

These facts were before the district court and were at issue at the time of the decision below. The district court did not hold that there was no issue of fact, but rather that there were no allegations of wrongdoing after July 31, 1972. The district court's decision was totally and squarely wrong and completely unsupported by the record in this respect as was the Fifth Circuit's affirmance. The only explanation for the district court's decision is the trial judge's opinion as to the *merits* of the case which was formed without hearing any evidence. The trial judge expressed to counsel in conference that he thought that plaintiff's "problems" were simply the result of a "personality con-

flict." (Plaintiff thereafter moved for a trial by jury which was denied.) That is a completely improper basis upon which to grant summary judgment.

Even if the application of the one-year statute of limitations was correct, the grant of summary judgment was totally inappropriate and a completely unprecendented departure from established law with regard to the claims of discriminatory treatment after July 31, 1972, and requires the exercise of this Court's power of supervision.

3. *Amended Complaint*

In *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 510 (1971), this Court stated:

> "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

Again, in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729 (1975), this Court recognized that the liberty interest in reputation is to be afforded constitutional protection and that school administrators cannot make charges which may damage one's reputation without affording due process safeguards.

The false and malicious written accusations against the plaintiff, which were placed in his personnel file in 1966 and in 1967 and which were concealed from him but which were relied upon for sanctioning the conduct taken against him, were made the basis for the amended complaint when they were discovered during discovery in this action in

1975. Those accusations were part of the reprisals taken against plaintiff for the exercise of his freedom of speech and they also deprived plaintiff of due process of law as they were used to justify actions against him without his ever being afforded even notice of the charges, much less the opportunity to be heard. This, therefore, presents a classic case of due process violations. Yet the trial court, without discussion, dismissed plaintiff's motion for leave to file the amended complaint as moot. There is nothing whatsoever that was moot about those claims.

The district court dismissed those claims as moot when they were not and their dismissal cannot be justified even if the Louisiana one-year tort statute of limitations is applicable. The rule is well established in Louisiana that the statute does not even begin to run with respect to defamatory statements which are concealed from the plaintiff until after he learns about them. *Cartwright v. Chrysler Corp.*, 255 La. 598, 232 So.2d 285 (1970); *Bernstein v. Commercial National Bank*, 161 La. 38, 108 So. 117 (1926). See also *Holmberg v. Armbrecht*, 327 U.S. 392, 66 S.Ct. 582 (1946).

There was simply gross error of constitutional dimensions by the courts below in denying plaintiff the opportunity to vindicate his constitutional rights with respect to the matters claimed in the amended complaint.

CONCLUSION

The issues involved here are serious and important enough in the administration of civil rights claims to justify this Court's consideration of this case. Further, irreconcilable conflicts exist among the circuits and even in cases

within the same circuit as to the applicable statute of limitations. The conflict can be resolved only by the intervention and direction of this Court. Moreover, with respect to the granting of summary judgment and denying the amended complaint, the lower courts in this case have departed so far from established and accepted judicial proceedings that the exercise of this Court's power of supervision is entirely warranted.

Transcending these considerations is the fact that justice requires that Anton Heyn be allowed his day in court to vindicate the deprivation of his constitutional rights. This Court offers the very last opportunity for him to do that. The Court has before it in his case a distinguished and dedicated teacher who had the courage, when no one else did, to criticize what he considered to be the ruthless firing practices of the university. For having that courage and exercising his constitutional right, he fell from the graces of the demi-gods at the university and suffered the severest persecution. In addition to being denied the salary and other remuneration which he should have received, he was villified and abused in every way possible. The most reprehensible action taken against him was the vicious maligning of his good name and reputation which was done in secret conspiracy behind his back without his knowledge and without affording him any opportunity to refute the false accusations. He sought relief in every way possible through the system and even obtained a meager measure of relief. It was only after he had exhausted his non-judicial avenues that he sought relief in court, but the door to the court has been slammed in his face and locked tightly. This is a classic free speech and due process case but plaintiff has been told, unlike others, that he waited too long, even

though the persecution continued. This Court must intervene to avoid the mockery of justice which has occurred in this case.

Respectfully submitted,

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COUNSEL FOR PETITIONER

September 1, 1977.

PROOF OF SERVICE

I, ROBERT EDWARD BARKLEY, JR., Attorney for Petitioner and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 1st day of September, 1977, I served three (3) copies of the Petition for a Writ of Certiorari in the above-captioned case on Respondents, Board of Supervisors of Louisiana State University and Agricultural and Mechanical College; Homer L. Hitt; George C. Branam; William B. Good; and Manuel L. Ibanez, by depositing such three copies in the United States Postal Service, first class postage prepaid, in a sealed envelope addressed to Counsel for Respondents: Rutledge C. Clement, Phelps, Dunbar, Marks, Claverie & Sims, Hibernia Bank Building, New Orleans, Louisiana 70112.

It is further certified that all parties required to be served have been served.

This is the 1st day of September, 1977, at New Orleans, Louisiana.

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APPENDIX A - Order of the United States District Court for the Eastern District of Louisiana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: March 12, 1976

ANTON N. J. HEYN	CIVIL ACTION
VERSUS	NO. 73-2027
BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY ET ALS	SECTION "H"

ORDER

The plaintiff in the present case has brought actions under 42 U.S.C. § 1983 and §1985(3), alleging discrimination, harassment, abuse, intimidation, reprisals, and systematic professional indignities on the part of the defendants against plaintiff, allegedly as a result of the plaintiff's exercising his constitutionally protected right of freedom of speech.

I. MOTION TO DISMISS

The defendants have filed a motion to dismiss both the § 1983 claim, in regard to all aspects of the suit previous to July 31, 1972, and the § 1975(3) [sic] claim.

For reasons which will follow the motion of defendants to dismiss the plaintiff's § 1983 claim, in regard to all

aspects of the suit previous to July 31, 1972 and the plaintiff's § 1985(3) claim is hereby GRANTED.

II. MOTION FOR SUMMARY JUDGMENT

The defendants' motion for summary judgment in regard to all aspects of the plaintiff's claim under § 1983, beginning July 31, 1972 and ending July 31, 1973, is hereby GRANTED. Reasons will follow.

III. MOTION FOR LEAVE TO FILE AMENDED COMPLAINT AND MOTION FOR TRIAL BY JURY

In light of the above rulings, the motion for leave to file amended complaint and the motion for trial by jury are DISMISSED AS MOOT.

New Orleans, Louisiana, this 11th day of March, 1976.

s/ R. Blake West
United States District Judge

APPENDIX B - Memorandum and Order of the United States District Court for the Eastern District of Louisiana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: June 7, 1976

ANTON N. J. HEYN	CIVIL ACTION
VERSUS	NO. 73-2027
BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY ET ALS.	SECTION "H"

MEMORANDUM AND ORDER

In this matter, the plaintiff, a professor of biology at the University of New Orleans, brought suit based upon 42 U.S.C. §1983 and 1985(3).

On March 11, 1976, the Court issued a judgment granting defendants' motions to dismiss and for summary judgment. The motions were granted for the following reasons:

I. *§1983 Cause of Action*

Because the defendants brought both a motion to dismiss and a motion for summary judgment as to the plaintiff's §1983 claim, it is necessary to discuss each motion separately.

A. *Motion to dismiss §1983 claim*

The defendants sought to dismiss all claims alleged to have occurred prior to July 31, 1972 on the ground that such claims had prescribed. Because §1983 makes no provision for a limitation period, the Court must apply the statute of limitations which governs the most analogous claim under appropriate state law. *Scott v. Vandiver*, 476 F.2d 238 (C. 4, 1973); *Waters v. Wisconsin Steel Works of International Harvester*, 427 F.2d 476 (C. 7, 1970); *Smith v. Olincraft*, 404 F.Supp. 861 (W.D. La., 1975). Plaintiff argues that there is no analogous statute under state law, and therefore the general statute of limitation of ten years, provided by Louisiana Civil Code Article 3544 (1870), is applicable.

Defendants, on the other hand, contend that plaintiff's action sounds in tort and that the one-year prescriptive period of Civil Code Articles 2315 and 3536 (1870) applies.

The fact that " §1983 should be read against the background of tort liability" has been recently restated by the Fifth Circuit in *Bryan v. Jones*, 519 F.2d 44, 45 (C. 5, 1975), and is well established law. *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed. 2d 288 (1967); *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed. 2d 492 (1961).

A careful review of the facts in the present case, as summarized by plaintiff in Paragraph 8, page 4, of the final pretrial order[1], makes it clear that plaintiff sought damages

1. "(8) Immediately following, and as a result of, the above exercises of plaintiff's constitutionally protected freedom of speech, plaintiff began to experience harrassment, intimidation, abuse, oppression, systematic professional indignities, reprisals, invidious discrimination,

for violation of his civil rights. Plaintiff did not file a claim under § 1981, which is the section of the Civil Rights Act which affords protection of contractual rights. Plaintiff's claim sounds in tort, and his contention that his civil rights were violated by a breach of any contractual rights is without merit.

Plaintiff's First Amendment rights are in no way dependent upon the existence of any rights he may possess as a result of breach of his contractual relationship with the defendants. This simple distinction was drawn in *Holden v. Boston Housing Authority*, 400 F.Supp. 399 (D. Mass., 1975), wherein the Court held:

> "If the plaintiff seeks to enforce rights under the First Amendment against deprivations by state officials, he would have that claim regardless of his contractual relationship with those officials or the agency for which they work." Id. at 402.

The fact that a contractual relationship existed between plaintiff and defendants is only incidental; the alleged violation of plaintiff's civil rights is no more or less serious because of it. The alleged wrongful acts occurred and the

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(Footnote 1 continued from previous page)

and numerous unfounded charges. Such treatment was initiated by Jack Carlton and was continued by Manuel Ibanez, who replaced plaintiff as Chairman of the Department. Defendants Good, Branan and Hitt were aware of the actions taken against plaintiff and in numerous instances approved such conduct and in all instances acquiesced therein and condoned same. The defendant Board of Supervisors was also aware of many of the actions taken against plaintiff but did nothing to correct them."

alleged injurious words were spoken before July 31, 1972.[2]

Furthermore, plaintiff's claim that he is entitled to back pay, asserted under the Civil Rights Act, sounds in tort, not in contract. *Watkins v. Scott Paper Co.*, F.2d. (C.5, 1976).

For the foregoing reasons, the Court concluded that the elements of plaintiff's claim which was based on events which occurred prior to one year before this suit was filed were barred by the one year statute of limitations of Articles 2315 and 3536. Accordingly, all aspects of the suit dealing with events which occurred prior to July 31, 1972 were dismissed with prejudice.

B. *Motion for Summary Judgment*

Defendants' motion to dismiss the cause of action under §1983 for claims which accrued prior to July 31, 1972 having been granted, the only remaining §1983 claim the plaintiff has is for events which allegedly occurred during the period beginning July 31, 1972, and ending July 31, 1973. A thorough review of the record reveals that, as defendants contend, there exists no allegation of wrong-doing on the part of defendants on or after July 31, 1972[3] , and that all of the alleged violations of plaintiff's civil rights occurred well before July 31, 1972. The fact that actions on the part of defendants (i.e., the wrongful denial of promotion) were allegedly still causing plaintiff injury after July 31, 1972 is not relevant to a determination of the date

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2. See plaintiff's deposition of April 25, 1975, particularly pgs. 19, 21, 23, 26, 37, 62, 73, 87, 114, 121, and 133.

3. See (1) plaintiff's original complaint, (2) plaintiff's note of evidence, and (3) the final pre-trial order.

on which the one-year limitation period began to run. Prescription began to run from the date the alleged act which caused the alleged injury took place. Plaintiff himself admits that he had been planning to bring this suit for over 10 years.[4] Indeed, if it were otherwise, once injured, a plaintiff's suit would never prescribe.

Hence, in the absence of any genuine issue as to any material fact, the defendants' motion for summary judgment was granted in regard to any remaining claims the plaintiff asserted under §1983.

II. *§ 1985 (3) Cause of Action*

Plaintiff has asserted a claim under 42 U.S.C. § 1985 (3), which was enacted by Congress in 1871 as the enforcement vehicle for the 13th Amendment. The original intent of the Congress in passing the Act, then commonly known as the Ku Klux Klan Act, was to provide to black persons equal protection of the laws of the United States and to rectify pre-existing moral and physical inhumanities. The legislative intent is clearly evident from the terms of the statute itself, which states:

> "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities

4. See p. 88, plaintiff's deposition of April 25, 2975, wherein plaintiff, when questioned about bringing suit, stated:

"I have waited a long time, ten years, to decide to do it, when all the channels were exhausted.

> under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States, or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

The United States Supreme Court in *Griffin v. Breckenridge*, 403 U.S. 88, 91 S.Ct. 1790, 29 L.Ed. 2d 338 (1971), formulated four elements necessary to establish a cause of action under §1985(3). These elements are:

1. A conspiracy by the defendants,

2. With a purpose of depriving the plaintiff of equal protection of the law or equal privileges

or immunities under the law,

3. A purposeful intent to discriminate, i.e., there must be some racial or perhaps otherwise class based invidiously discriminatory animus behind the conspirators' action, and

4. Injury to the person or property of the plaintiff or his deprivation of a right or privilege as a citizen of the United States resulting from actions in the furtherance of the conspiracy.

See also, *Jacobson v. Industrial Foundation of the Permian Basin*, 456 F.2d 258 (C.5, 1972); *Kletsunka v. Driver*, 411 F.2d 436, 447 (C.2, 1969).

Plaintiff asserts that he is a member of a class of university professors who were discriminated against in the exercise of their First Amendment privileges, and, therefore, that § 1985(3) should apply. The Court does not agree. The mere allegation that Professor Heyn was discriminated against does not of itself make § 1985(3) applicable. The courts have consistently "[r]ejected complaints containing mere conclusory allegations of deprivations of constitutional rights protected under § 1985(3). A conspiracy claim based upon § 1985(3) requires a clear showing of invidious, purposeful and intentional discrimination. . . " *Robinson v. McCorkle*, 462 F.2d 111, 113 (C. 3, 1972); see also *Byrd v. Local Union #24, IBEW*, 375 F.Supp. 545, 552 (D.Md., 1974). Furthermore, the requisite invidiously discriminatory intent must be shown to be class-based. *O'Neill v. Grayson County War Memorial Hospital*, 472 F.2d 140, (C.6, 1973).

As the Fifth Circuit succinctly stated in *Westberry v. Ginan Paper Company*, 507 F.2d 206, 210 (C.5, 1975; reh. en banc granted, March 18,1975); opinion withdrawn, May 23, 1975 (based on mootness):

> "Plaintiff's 1985(3) action cannot be sustained under the Griffin Court's Thirteenth Amendment rationale. The aim of the amendment is to provide protection for racial groups which have historically been oppressed, Jones v. Mayer, 1968, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 or those chafing under the hands of involuntary servitude. Clyatt v. United States, 1905, 197 U.S. 207, 25 S.Ct. 429, 49 L.Ed. 726. Plaintiff is neither in a racially oppressed group nor serving involuntarily."

See also *Dombrowski v. Dowling*, 459 F.2d 190, 196 (C.7, 1972); *Jones v. Bales*, 58 F.R.D. 453, 457-58 (N.D. Ga., 1972), aff'd 480 F.2d 805 (C.5, 1973); *Furumoto v. Lyman*, 362 F.Supp. 1267 (N.D.Cal., 1973).

The Civil Rights Act of 1871 was not designed to furnish relief for every injury.[5] As stated, plaintiff has failed to demonstrate the class-based animus necessary to maintain this action. Additionally, plaintiff has failed to establish a class which is a proper recipient of the protections conferred by 42 U.S.C. § 1985. He is neither a member of a racially oppressed group, nor is he a member of a group serving involuntarily. For this reason, the plaintiff has failed to state a claim under 42 U.S.C. § 1985 (3).

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5. There can be no doubt that personal dislike is a strong factor in this case, but personal dislike is insufficient to permit recovery under § 1985(3).

III. JUDGMENT

Therefore, IT IS HEREBY ORDERED that judgment be entered accordingly.

New Orleans, Louisiana, this 4th day of June, 1976.

s/ R. Blake West
UNITED STATES DISTRICT
JUDGE

APPENDIX C - Judgment of the United States District Court for the Eastern District of Louisiana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: June 16, 1976

ANTON N. J. HEYN, Plaintiff — CIVIL ACTION

VERSUS — NO. 73-2027

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, HOMER L. HITT, GEORGE C. BRANAM, WILLIAM B. GOOD, and MANUEL L. IBANEZ, Defendants — SECTION "H"

JUDGMENT

On Motions of defendants, Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, Homer L. Hitt, George C. Branam, William B. Good, and Manuel L.Ibanez, to dismiss and, alternatively, for summary judgment,

IT IS ORDERED, ADJUDGED AND DECREED that there be Judgment herein in favor of defendants, Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, Homer L. Hitt, George C. Branam, William B. Good, and Manuel L. Ibanez, and against plaintiff, Anton N. J. Heyn, dismissing with prejudice plain-

tiff's action on the merits, each party to bear their own costs.

New Orleans, Louisiana, this 16th day of June, 1976.

s/ Nelson B. Jones
CLERK OF COURT

APPROVED AS TO FORM:

S/ R. Blake West
UNITED STATES DISTRICT JUDGE

Date of Entry June 16, 1976

APPENDIX D - Memorandum and Order of the United States District Court for the Eastern District of Louisiana

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED: July 27, 1976

ANTON N. J. HEYN	CIVIL ACTION
VERSUS	NO. 73-2027
BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY ET ALS	SECTION "H"

MEMORANDUM AND ORDER

Plaintiff filed suit in July, 1973, alleging certain violations by Defendants of his civil rights under Title 42 United States Code Sections 1983 and 1985(3). Defendants filed motions to dismiss and for summary judgment, which motions were argued, taken under advisement, and finally granted. On June, 1976 a judgment dismissing Plaintiff's action was entered. Subsequently, Plaintiff filed a motion to reconsider, alter, amend, vacate, and satisfy judgment. This motion was argued July 7, 1976 and taken under advisement.

After having carefully reviewed the extensive memoranda submitted by the parties, it is the opinion of the Court that, for the following reasons, the motions should be denied.

Plaintiff's motion challenges the granting of Defendants' motion for summary judgment, and the granting of the motion to dismiss the Section 1983 claim. Plaintiff does not attack the dismissal of his Section 1985(3) claim.

Plaintiff's underlying contentions are two-fold. First, Plaintiff argues that the so-called "catch all" statute of limitations [1] should be applied, as opposed to the statute of limitations Louisiana courts have applied to delictual claims; secondly, Plaintiff argues that, if his claim does indeed sound in tort, the actions taken by Defendants span a period of ten years, and because Defendants have persisted in their course of wrongful action during that time and to the present [2], the "tort" is continuous in nature and therefore the cause of action has not prescribed. However, Plaintiff has cited no authority supportive of his contentions which was not previously argued to the Court on the motions to dismiss and for summary judgment. Recent decisions by the United States Supreme Court [3] and the United States Court of Appeals for the Fifth Circuit [4] lend further support to the Court's position. The motion for a new trial is, therefore, DENIED.

New Orleans, Louisiana, this 26th day of July, 1976.

s/ R. Blake West
UNITED STATES DISTRICT
JUDGE

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1. La. Civil Code Art. 3356.

2. Although it is doubtful whether actions of the defendants which took place subsequent to the filing of this suit are relevant, the question is mooted by the Court's decision.

3. *Imbler v. Pachtman*, 44 U.S.L.W. 4250; *Bishop v. Wood*, 44 U.S.L.W. 4820.

4. *Watkins v. Scott Paper Company*, 530 F.2d 1159 (C. 5, 1976).

APPENDIX E - Opinion of the United States Court of Appeals for the Fifth Circuit affirming the decisions of the United States District Court for the Eastern District of Louisiana

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76 - 3488
Summary Calendar*

ANTON N. J. HEYN,

Plaintiff-Appellant

versus

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE; HOMER L. HITT; GEORGE C. BRANAM; WILLIAM B. GOOD; and MANUEL L. IBANEZ

Defendants-Appellants

Appeal from the United States District Court for the Eastern District of Louisiana

(March 31, 1977)

BEFORE GOLDBERG, CLARK and FAY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409 Part I.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.